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No. 90-241

Supreme Court, U.S.
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**In The
Supreme Court of the United States
October Term, 1990**

GEORGE G. RHODES,

Petitioner,

vs.

**STATE OF NEBRASKA EX REL.
NEBRASKA STATE BAR ASSOCIATION,**

Respondent.

**On Petition For Writ Of
Certiorari From The Supreme Court Of The
State Of Nebraska**

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

In an attorney disciplinary proceeding, may a state supreme court impose a sanction of suspension from the practice of law against an elected county attorney for misconduct which is in violation of the Code of Professional Responsibility?

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BRIEF IN OPPOSITION TO PETITION
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The State of Nebraska State ex rel. Nebraska Bar Association submits this brief in opposition to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This is an attorney disciplinary case. The Petitioner was suspended from the practice of law for a period of

three years by the Nebraska Supreme Court. (App. 1, Petition for Writ of Certiorari). At the time of his misconduct, the Petitioner was the elected County Attorney of Custer County, Nebraska.

As the County Attorney, the Petitioner filed a misdemeanor case of criminal mischief against a young man by the name of Speer. Petitioner had previously given expensive gifts to Speer.

During the pendency of the criminal case the Petitioner and Speer developed a close and personal relationship. They took two trips together and made arrangements for a trip to Vancouver. The Petitioner paid all expenses for these trips and continued to buy gifts for Speer. While the criminal case was pending, the Petitioner also offered to pay Speer's college expenses and car payments.

Despite this relationship, the Petitioner continued to prosecute Speer.

The criminal mischief case was eventually dismissed by the Petitioner. The next day the Petitioner and Speer left together on a trip to Vancouver. The Petitioner paid all of Speer's expenses.

After the Vancouver vacation, the Petitioner's relationship with Speer soured. The Petitioner wanted the relationship to continue. Speer wanted it to stop.

Approximately two months after the Vancouver trip, the Petitioner filed a felony burglary charge against Speer. The charge was based on the same police report which gave rise to the earlier criminal mischief case. This burglary charge was later dismissed by the Petitioner and

the Petitioner filed felony offenses of kidnapping and false imprisonment against Speer. The later two charges were based upon an incident unrelated to the alleged burglary.

The Petitioner eventually withdrew from the Speer prosecutions. The Petitioner then engaged in a series of bizarre and erratic behavior towards the special prosecutor and Speer.

The Petitioner appeared at a deposition with a 12-inch bayonet which was unrelated to the underlying case. He also took Speer's deposition and interrogated him as to their personal relationship. At this deposition, the Petitioner wore a mail-order policeman's uniform, a moot court medal and a loaded pistol. The Petitioner claimed that he was entitled to wear the uniform because he was the county coroner. The Petitioner also became physically aggressive towards the special prosecutor and continued to give expensive gifts to Speer.

The Nebraska Supreme Court, in a unanimous decision, concluded that the Petitioner had violated the Code of Professional Responsibility and that a suspension from the practice of law for three years was warranted. *State ex rel. NSBA v. Rhodes*, 234 Neb. 799, 453 N.W. 2d 73 (1990) (App. 1, Petition for Writ of Certiorari).

ARGUMENT

I.

THE PETITION SATISFIES NONE OF THE TRADITIONAL STANDARDS GOVERNING REVIEW OF CERTIORARI.

This is an attorney discipline case which has narrow applicability. The issues are primarily factual in nature and do not involve substantial federal questions.

The decision reached by the Nebraska Supreme Court is consistent with legal authority and does not conflict with prior decisions of this Court.

This case does not warrant the Court's review.

II.

THE CASE BELOW WAS CORRECTLY DECIDED.

The record demonstrates that an adequate factual basis exists for the suspension of the Petitioner from the practice of law and that the decision of the Nebraska Supreme Court was manifestly correct.

A great deal of the Petitioner's Writ is devoted to the argument that the Nebraska Supreme Court wrongfully found that he had a conflict of interest when he prosecuted his close friend. This issue does not involve a federal question.

The Petitioner claims that his conduct did not violate the Code of Professional Responsibility. He argues that at the time he prosecuted his close friend it was ethically permissible to do so.

The Disciplinary Rule which is in dispute is DR 5-101 (A) of the Code of Professional Responsibility. (App. 59, Petition for Writ of Certiorari). The Petitioner obviously violated this Code provision. Since DR 5-101 (A) was adopted long before he prosecuted his friend, the Petitioner's complaint regarding the application of this rule to his case is difficult to grasp.

The prohibition against a prosecuting attorney participating in a case in which the attorney's professional judgement may be affected by personal interests is well established. Contrary to the Petitioner's contentions, the prohibition is neither new nor novel. *People v. Nuzzi*, 128 Misc. 2d 502, 489 N.Y.S. 2d 836 (1985); *People v. Schrager*, 74 Misc. 833, 346 N.Y.S. 2d 101 (1973); *In the Matter of Ronald L. Davis*, 471 N.E. 2d 280 (Ind. 1984); *Kennedy v. L.D.*, 430 N.W. 2d 833 (Minn. 1988); *State v. Bell*, 84 Idaho 153, 370 P. 2d 508 (1962); and *People v. Doyle*, 159 Mich. App. 632, 406 N.W. 2d 893 (1987).

The Nebraska Supreme Court rightfully concluded that the Petitioner had violated the Code of Professional Responsibility. The Petitioner's claim that he did not violate the Code is totally without merit.

III.

THE PETITIONER WAS GIVEN ADEQUATE NOTICE OF THE ALLEGATIONS AGAINST HIM.

The Petitioner complains that he was not given adequate notice as to the nature of the allegations against him. An examination of the Formal Charges (App. 52, Petition for Writ of Certiorari) refutes this contention.

The Formal Charges consist of 39 detailed paragraphs describing the Petitioner's conduct. The provisions of the Code of Professional Responsibility which were violated by the Petitioner are specifically set forth in the Formal Charges.

The Petitioner received full and adequate notice of the allegations against him.

IV.

THE PETITIONER IS NOT IMMUNE FROM THE ATTORNEY DISCIPLINE SYSTEM ESTABLISHED BY THE NEBRASKA SUPREME COURT.

The Petitioner contends that he is immune from the attorney discipline system of the Nebraska Supreme Court as he was the elected County Attorney of Custer County, Nebraska at the time of his misconduct. This position is contrary to established law.

In Nebraska, the Supreme Court has inherent authority to regulate the conduct of attorneys. *In re Integration of the Nebraska State Bar Association*, 133 Neb. 283, 275 N.W. 265 (1937). In exercising this power, the Nebraska Supreme Court has held that public prosecutors are subject to sanctions for ethical misconduct. *State ex rel. NSBA v. Holscher*, 193 Neb. 729, 230 N.W. 2d 75 (1975); *State ex rel. NSBA v. Hollstein*, 202 Neb. 40, 274 N.W. 2d 508 (1979); *State ex rel. NSBA v. Gobel*, 201 Neb. 586, 271 N.W. 2d 41 (1978); *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W. 2d 515 (1987), appeal dismissed, cert. denied, 109 S. Ct. 31.

It has long been recognized in other jurisdictions that public prosecutors are not immune from disciplinary

prosecutions. *United States v. Kelly*, 550 F. Supp. 901 (D.C. Mass., 1982); *Price v. State Bar*, 30 Cal. 3d 537, 638 P. 2d 1311 (1982); *Re Conduct of Burrows*, 291 Or. 135, 629 P. 2d 820 (1981); *Re Wilson*, 76 Ariz. 49, 258 P. 2d 433 (1953); *Re Friedman*, 76 Ill. 2d 392, 392 N.E. 2d 1333; *Re Norris*, 60 Kan. 649, 57 P. 528 (1899); *Attorney Grievance Com. v. Green*, 278 Md. 412, 365 A. 2d 39 (1976); *Re Forbes*, 192 Minn. 544, 257 N.W. 329 (1934); *Re Graves*, 347 Mo. 49, 146 S.W. 2d 555 (1941); *Re Jelliff*, 271 N.W. 2d 588 (N.D. 1978); *Re Barnes*, 281 Or. 375, 574 P. 2d 657 (1978); *Re Rachmiel*, 90 N.J. 646, 449 A. 2d 505 (1982).

In a recent case, *Ramsey v. Tennessee Supreme Court Board of Professional Responsibility*, 771 S.W.2d 116 (Tenn. 1989) *cert. denied*, 110 S.Ct. 278 (1989), disciplinary authorities brought charges against an elected district attorney. The district attorney argued that the state constitution provided that impeachment was the exclusive method of removing him from office and that suspending him from the practice of law would be a violation of the separation of powers principles of the Tennessee and United States Constitutions. The Tennessee Supreme Court rejected the district attorney's argument and found that a suspension from the practice of law is not equivalent to an impeachment. The Court stated that one's status as a district attorney does not constitute a shield or protection to an attorney who violates his oath or the disciplinary rules.

The Petitioner's argument for immunity is based primarily upon an unpublished opinion of the Superior Court of Dekalb County, Georgia. His position is contrary to established law and does not warrant a review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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